FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5781

FRANK L. RAKAS and LONNIE L. KING,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I.

PETITIONERS HAVE ASSERTED ACTUAL STANDING TO CONTEST THE SEARCH AS VICTIMS OF AN INVASION OF PRIVACY AND HAVE NOT, AS RESPONDENT ERRONEOUSLY ASSUMED, RELIED UPON THE "AUTOMATIC" STANDING RULE.

Respondent has incorrectly assumed, merely because the Petitioners have cited *Jones v. United States,* 362 U.S. 257,

80 S. Ct. 725, 4 L.Ed.2d 697, 78 ALR 2d 233 (1960) in support of their position, that they have relied upon the so-called "automatic" standing rule which arose from that decision. Respondent has thus overlooked the disclaimer to the contrary on page 8 of Petitioners' brief. Moreover, Respondent has, by convoluting the dual rationale of *Jones,* wrongly concluded that "automatic" standing and the legitimately-on-the-premises rule, which also arose from the *Jones* decision, are the same.

As most courts have concluded, there are two distinct types of standing recognized in *Jones.* One type is indeed "automatic" standing conferred upon a defendant who is charged with a crime which includes as an essential element possession of the evidence seized. There is, however, another totally separate type of standing discussed in *Jones,* recently termed "actual" standing which is accorded the victim of an "invasion of privacy." Among those suffering such an invasion of privacy are individuals, like Petitioners, who were legitimately on the premises when the search occurred. *See* the discussion in *United States v. Cella,* 568 F.2d 1266, 1280 (9th Cir., 1977).

Notwithstanding Respondent's claim, this Court's decision in *Brown v. United States,* 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973), involving defendants who were not present on the premises when the contested search and seizure occurred, most certainly did not bring into question the second aspect of *Jones, i.e.,* the legitimately-on-the-premises rule. In obvious contrast to its analysis of "automatic" standing, the *Brown* opinion recognized the legitimately-on-the-premises rule as an independent rule of standing:

> Presence of the defendant at the search and seizure was held, in *Jones,* to be a sufficient source of standing *in itself.* (emphasis added). 362 U.S. 223, 227 [footnote 2], 93 S. Ct. 1565, 1568, 36 L.Ed.2d 209, 213.[1]

In addition, the holding in *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968), which excluded as trial evidence any testimony given by a defendant during a pretrial hearing to establish his standing, did nothing to undermine the legitimately-on-the-premises rule. To be sure, the *Simmons* doctrine may have partially alleviated the so-called "dilemma" addressed in *Jones*; but, even if the effect of *Simmons* was to make the first basis for standing outlined in *Jones* unnecessary (*i.e.,* "automatic" standing), the second *Jones* basis, the legitimately-on-the-premises rule, remains inviolate. The legitimately-on-the-premises rule was formulated not to respond to the "dilemma" at which automatic standing was directed but to establish the right of privacy rather than property concepts as the core of Fourth Amendment protection. Accordingly, it remained unaffected by *Simmons.* [It is of particular interest that all of the cases cited in footnote 1, wherein the continuing validity of the legiti-

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[1]Several other opinions of this Court since *Jones* have also recognized the continuing validity of the legitimately-on-the-premises rule as an independent ground for standing. *E.g., Combs v. United States,* 408 U.S. 224, 227 [footnote 4], 92 S. Ct. 2284, 2286, 33 L.Ed.2d 308, 311 (1972); *Alderman v. United States,* 394 U.S. 165, 172 [footnote 7], 89 S. Ct. 961, 966, 22 L.Ed.2d 176, 186-187 (1969); *Spinelli v. United States,* 393 U.S. 410, 412 [footnote 2], 89 S. Ct. 584, 587 21 L.Ed.2d 637, 641 (1969); *Mancusi v. DeForte,* 392 U.S. 364, 368 [footnote 5], 88 S. Ct. 2120, 2123, 20 L.Ed.2d 1154, 1159 (1968).

mately-on-the-premises rule was recognized, were decided after *Simmons.*][2]

II.

RESPONDENT'S ARGUMENT REGARDING THE POTENTIAL EFFECT OF THE DIRECTED-AT THEORY IS EXAGGERATED, AND ITS CONCLUSION THAT THE PETITIONERS WERE NOT THE TARGETS OF THE CONTESTED SEARCH IS CONTRARY TO WHAT THE RECORD OF TRIAL SHOWS.

Respondent has made both a policy argument and a factual argument against Petitioners' reliance upon the

[2]Apparently, Respondent believes that the instant Petitioners should be placed in the same position as the defendant in *Simmons* (Garrett), who was not present at the time of the search in that case and thus was forced to claim a proprietary interest in the objects seized in order to establish his standing. This is illogical, in Petitioners' view, because they had an expectation of privacy, aside from proprietary interests, which the *Simmons* defendant lacked. In any event, while Petitioners did agree that they did not own the automobile, they were never asked whether they had any ownership of the gun or other items seized during the search. Their appointed counsel stated in argument: ". . . I don't think they have to admit these are their items. I think they do have a standing which they have shown" (A23). Assuming *arguendo* that the Public Defender was wrong in this regard, Petitioners should not have to suffer the consequences of their attorney's mistake. After all, the prosecutor did not file a written motion attacking Petitioners' standing prior to the suppression hearing, and the trial court denied the Public Defender's request for time to research the points raised orally by the prosecutor. Hence, the defense should still be afforded a chance to properly establish standing assuming this has not already been done, *c.f. Combs v. United States,* 408 U.S. 224, 92 S. Ct. 2284, 33 L.Ed.2d 308 (1972) where the case was remanded for further proceedings on the question of petitioner's standing.

directed-at theory as a second ground for their standing. Both of its arguments, however, are based upon faulty premises.

Regarding its policy argument, Respondent reasoned that the directed-at theory would allow "*anyone* against whom illegally seized evidence *might* be used to object" (Respondent's brief at page 8 — emphasis in original). This reasoning, of course, is incorrect because the directed-at theory, like other accepted tests for standing, is limited in applicability. In order to challenge the admissibility of evidence under the directed-at theory, one would have to establish that he was, in fact, the target of the disputed search. Respondent, though, erroneously assumed the theory would somehow confer standing upon "anyone" who wished to contest an illegal police search and, for that reason, has grossly exaggerated the potential effect of the directed-at theory.

Respondent has likewise made a factual error in its brief by claiming, on page 8, that the search at issue was not really directed at Petitioners. It was apparently Respondent's logic that since the automobile in which Petitioners were riding corresponded to the general description of the robbers' getaway car, the object of the search was the automobile itself rather than its occupants. One might refute this claim in several ways, but it is perhaps sufficient to simply note that, according to the record of the trial, the car in which Petitioners were riding was not the getaway car, and the police were fully aware of that fact prior to the search.

It should be explained that the car used by the robbers to make their getaway was stolen from one of the victims of the robbery. Consequently, the police were initially on the look-out for this car, having its general description and a

partial license number. At the suppression hearing, Officer Sollers testified that his attention was drawn to the automobile occupied by Petitioners because it was the same make and model as the stolen getaway car, *i.e.*, a Plymouth Roadrunner (A15-16). However, the similarity between the two vehicles served no further purpose because, as Sollers made clear in his trial testimony, he learned from a radio report shortly after sighting the automobile that the true getaway car had already been recovered (R193). Moreover, he later "ran a license check" on the vehicle he had spotted, in which Petitioners were riding, and was informed of the owner's name which obviously was not that of the robbery victim to whom the getaway car belonged (R194). This too was accomplished before the stop and search. Therefore, once this information became known to the police, no suspicions surrounded the automobile in which Petitioners were riding, and the sole reason for the contested police action had to be the lingering suspicion of the police that Petitioners might still be the robbers. It cannot be reasonably claimed, then, that the search was directed at any person or object other than Petitioners.[3]

[3]The full sequence of events, according to Officer Soller's trial testimony, was as follows: Sollers, while watching the highway from a parking lot 4½ miles north of the robbery site, noticed the automobile in which Petitioners were riding about 10 to 15 minutes after receiving a radio report of the robbery. He then followed this automobile to a lounge where he watched Petitioners and their female companions enter. But, since the license number of their automobile did not match that of the getaway car, Sollers returned to the highway momentarily to continue his lookout for the getaway car. Next, following another wait of 5 to 10 minutes, he overhead a radio call announcing the recovery of the abandoned getaway car. So, Sollers decided to go back to the lounge, thinking the robbers might have changed vehicles; and it was at this point that he telephoned the Sheriff's office for a better description of the robbers and for a "license check" on the automobile. Thereafter, Petitioners and their companions left the lounge and proceeded southbound on the highway toward the robbery site near which the stop and search was conducted (R191-197).

III.

THE *AMICUS CURIAE* HAS INCORRECTLY CONCLUDED THAT PETITIONERS SEEK TO EXPAND THE SCOPE OF THE EXCLUSIONARY RULE, AND ITS FACTUAL VIEW OF THIS CASE IS BASED UPON AN INCOMPLETE READING OF THE TRIAL RECORD.

Contrary to the brief of the *amicus curiae*, Petitioners do not seek to expand the scope of the exclusionary rule by conferring standing upon a class of persons whose Fourth Amendment rights were not directly violated. Petitioners' Fourth Amendment rights were, in fact, violated because they had a reasonable expectation of privacy flowing from their legitimate presence in the Clontz automobile; thus, they were victims of an invasion of privacy. (See subsection I.C. of the Argument portion of the Brief for Petitioners and cases cited therein, particularly those in footnote 5 on page 13). It follows that Petitioners are not seeking an expansion of the scope of the exclusionary rule.[4]

Alternatively, the *amicus curiae* has advanced a new means of defeating standing, a sort of "police good faith" test, wherein standing to challenge a Fourth Amendment violation would be allowed only if the disputed police conduct was "wilful and flagrant". This theory, of course, is not supported by authority and is illogical since police motivation is a factor to be considered on the ultimate issue

[4]Because the Petitioners are not seeking an expansion of the scope of the exclusionary rule, they do not perceive that the policy aspects of the exclusionary rule touched upon in subsection I.B. of the *amicus'* Brief are drawn into question in this case.

of whether the search was illegal, not on the question of standing. In any event, the *amicus*' conclusion that the police acted in good faith here is based upon an incomplete reading of the record. As has been noted herein in reply to Respondent's similar argument, the police no longer suspected at the time of the stop and search that the automobile in which Petitioners were riding was the robbers' getaway car. [*See* footnote 3]. Thus, the police were not acting in good faith, and the Petitioners' standing survives even the novel test posited by the *amicus* itself.

CONCLUSION

For the reasons stated, it is asserted that the state court's erroneous judgment, that Petitioners lacked standing, should be reversed and the case remanded for a determination as to the legality of the search which the Petitioners sought to challenge.

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